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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/625,716

Filing Date: July 23, 2003

Appellant(s): LINSKY ET AL.

George Bonanto
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 5-12-08 appealing from the Office action mailed 12-28-07.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is deficient. 37 CFR 41.37(c)(1)(v) requires the summary of claimed subject matter to include: (1) a concise explanation of the subject matter defined in each of the independent claims involved in the appeal, referring to the specification by page and line number, and to the drawing, if any, by reference characters and (2) for each independent claim involved in the appeal and for each dependent claim argued separately, every means plus function and step plus function as permitted by 35 U.S.C. 112, sixth paragraph, must be identified and the

structure, material, or acts described in the specification as corresponding to each claimed function must be set forth with reference to the specification by page and line number, and to the drawing, if any, by reference characters. The brief is deficient because the "Summary of the Invention" does not include details as to where in the Specification each dependent claim is supported by the Specification.

Support in the specification in regard to dependent claims 2,12 and 20, wherein the claims state that the garment is a shirt fabricated from a thin material, is found on page 13, lines 6-13 and page 19 , lines 1-15 of the original specification. Support for claims 3, 13 and 21 in regard to the "low coefficient of friction", can be found in the specification on page 13, lines 6-21 and page 19, lines 1-15. Support for claims 4, 8, 16, 22 and 26, in regard to the examination patterns, can be found on pages 14, line 1- page 19, line 14. Support for claims 5,14 and 23, in regard to the alignment mark, is found on page 19, lines 1-15 of the specification. Support for claims 6,15 and 24, in regard to the "at least one aperture", is found on page 14, line 18 of the specification. Support for the "at least one armpit examination pattern", of claims 7 and 25, is found on page 15, line 6 and page 19, line 13 of the specification. Support for

the "At least one marking instrument/pens", as claimed in claims 9, 10, 17, 18, 27 and 29, is found on page 19, line 17- page 21, line 17 and in figure 5.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

5,479,661	Fingelson et al	1-1996
4,873,982	Morrison	10-1989
6,412,491	Rusin	7-2002

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-5, 8 and 28 are rejected under 35 U.S.C. 102(b) as being anticipated by Fingelson et al (US 5,479,661).

In regard to claim 1, Fingelson et al discloses a breast self-examination apparatus, garment 10, including a form-fitting garment (since it fits a wearer's form as broadly claimed and interpreted) with at least one examination pattern 38,40 (See Fingelson et al in col. 3, lines 35-67 and col. 4, line 10) disposed on the garment wherein the garment is a shirt (such as a sleeveless shirt) and formed from a thin material (See Fingelson et al, col. 3, lines 1-4). Appellant's specification did not provide a specific definition for the term "form-fitting". Appellant's specification in the "Summary of the Invention" and in the "Detailed Description" indicate that a garment that holds the breasts in a relative stationary and flattened or compressed position is a preferred embodiment of the invention. A non-preferred embodiment and therefore, the general term of "form-fitting" does not require that the breasts be held in a relatively stationary, flattened or compressed position. The Fingelson et al garment discloses a form-fitting garment as broadly claimed in addition to "armpit areas" wherein the open area under the arms, in addition to the garment fabric area adjacent to the arm areas and thereabout the side of the garment that would inherently fold around and under the wearer's arms when worn, is the "armpit area" as broadly interpreted. Appellant has not claimed or disclosed the exact metes and bounds of the "armpit areas" or that the "armpit areas" have fabric therein or a specific fabric structure therein. Only general "armpit areas" have been claimed and disclosed which leads to a broad interpretation of those armpit areas by the Examiner.

The Fingelson et al apparatus comprises a low coefficient of friction as broadly claimed and interpreted since the material that forms the Fingelson et al garment is a

general garment fabric (col. 3, lines 1-3) which would provide and allow for the movement of the hands or fingers on the surface of the garment about the breasts with the examination pattern disposed on the garment so that it overlies a breast of the wearer as claimed in claims 3 and 4. (See Fingelson et al, col. 3, line 35 - col. 4, line 23). The material of Fingelson et al is of the same material as appellant has claimed since the materials claimed are just general garment or shirt fabrics widely used in the marketplace. The Fingelson et al garment further comprises at least one alignment mark 42 centrally disposed within the examination pattern to center a wearer's nipple as claimed in claim 5. (See Fingelson et al, col. 3, line 42). Fingelson et al discloses the pattern design as claimed in claim 8 as seen in the figures. In regard to claim 28 Fingelson et al discloses the method of breast self-examination including obtaining the breast examination form-fitting garment 10 with the pattern 38,40; putting on the garment, aligning the garment pattern with the breast and examining the breasts as claimed. (See Fingelson et al, col. 4, lines 10-23 and figures 1 and 3-8). The wearer of Fingelson et al would palpitate the breast from "outside of the garment" wherein the term "outside of the garment" is broadly considered to be away from the garment material layer or outside of the garment material and not sliding or gliding over the garment material "surface" as intended by applicant. Applicant did not properly claim the step of palpitating the breast from the outer surface of the garment material as intended. The user of Fingelson et al would guide their finger over the breasts over at least one of the examination areas as claimed in order to align the fingers with the specific pattern more accurately instead of using eye hand coordination to palpitate the

desired pattern areas. The term “outside” is a relative term with no context given regarding what it is “outside” with respect to. Therefore, either side of the garment or garment material surface could be considered to be the “outside”. The side next to the body is an outer or exterior surface to the same extent that the side away from the body is and both sides are equidistant from the center of the garment.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 7, 11-14 and 16 are rejected under 35 U.S.C. 103(a) as being unpatentable over Fingelson et al in view of Morrison (US 4,873,982).
Fingelson et al discloses the invention substantially as claimed. However, Fingelson et al does not specifically disclose the garment as extending directly over the underarm area. It is well known that the breasts, especially of large breasted women, extend to the underarm or side area of a women's body in addition to the lymph glands affected by breast cancer which are also known to extend into the underarm area. The Morrison garment is a breast examination garment that extends to an underarm or side area of the wearer and is also constructed of a material with the desired coefficient of friction for easy examination across the wearer's skin in addition to under the arms with the tube top structure of the garment. Morrison also discloses that the garment is adapted for use in other areas of the body where the detection of lumps is desired (such as the

underarm area). (See Morrison, col. 4, lines 18-27). Also, it is disclosed by Morrison that a doctor may mark the garment area where checking or examination is desired. (See Morrison, col. 4, lines 12-17). Accordingly it would have been obvious to one having ordinary skill in the art at the time the invention was made to construct the Flngelson garment to extend under the arm areas by including the side portions as seen in Morrison and to mark those areas in a similar fashion as the Fingelson front surface as suggested by Morrison in col. 4, lines 12-17 in order to effectively examine the wearer for breast cancer. The Fingelson et al and Morrison garments are shirts and have the desired coefficient of friction as claimed in claims 12 and 13. The coefficient of friction claimed is only so that one may glide their hand or finger there over the garment. No specific coefficient numbers, measurement or figures have been claimed or disclosed. Only a "low coefficient of friction to facilitate hand and finger movement" has be disclosed. "Low" is a relative term and Appellant's original specification and claims has not provided an indication as to what the coefficient of friction is , as to what a "low" coefficient of friction encompasses or as to what the coefficient of friction is "low" in respect to. Also appellant has not described as to what "hand and finger movement are being facilitated" encompasses. The Examiner interpreted such movement as being that one can slide or glide their hand or fingers over the material. When a finger or hand is glided over the plastic of Flngelson et al the hand's movement is facilitated there over the wearer's breast. Such movement is easier over plastic, paper or other soft materials than it would be over a non-smooth, dense pile fabric such as a velvet or corduroy. Therefore, the movement has been facilitated by using a

smooth material like a plastic having a lower coefficient of friction than some other materials with a dense pile. Applicant's claimed materials are well known garment or shirt materials all of which allow easy movement across the fabric surface with one's hands or fingers. Fingelson et al discloses the central mark 42 with the examination patterns as in claims 14 and '6. (See Morrison, col. 4, lines 12-27).

Claims 9, 10, 19-23, 25-27 and 29 are rejected under 35 USC 103(a) as being unpatentable over Fingelson et al (US 5,479,661) in view of Rusin (US 6,412,491).

Fingelson et al discloses the invention substantially as claimed. However, Fingelson et al does not specifically disclose the marker pens as claimed. Rusin discloses a breast examination device with a sheet material and a marker pen as described in col. 3, lines 32-34-not numbered, in order to mark areas on the sheet 101 for further examination or areas of further concern. Accordingly it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the garment of Fingelson to include marking pen to mark areas on the garment over the sites on the wearer where further examination or areas of interest are on the wearer.

Claims 17 and 18 are rejected under 35 USC 103(a) as being unpatentable over Fingelson et al (US 5,479,661) in view of Morrison (US 4,873,982) and further in view of Rusin (US 6,412,491)

Fingelson et al and Morrison disclose the invention substantially as claimed. However, they do not specifically disclose the marking indicators as claimed. Rusin discloses a marking pen as described in col. 3, lines 32-34 that is used to mark areas of

interest or areas for further examination on the sheet material covering the wearer or patient. Accordingly it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the garment of Fingelson et al and Morrison to include a marking pen as disclosed by Rusin in order to mark areas on the garment over the sites where further examination or area of interest are on the wearer.

(10) Response to Applicant's Arguments

Response to Arguments in Regard to Ground I, Rejection of Claims 1-5, 8 and 28

It is still the Examiner's position that Fingelson et al discloses a form-fitting, breast self examination garment with a pattern thereon as broadly claimed. The Fingelson garment fits the wearer's form and is therefore form fitting as broadly claimed. No specific form-fitting structure, such as spandex, or a knit fabric structure which would cling to a wearer has been claimed. The term "formfitting" is broadly defined as being snugly or closefitting on a wearer which would depend on the size and shape of a wearer. The fabric of Fingelson et al garment fits snugly or closely across the wearer's chest just as Appellant's shirt in that it lies across the wearer's chest. A t-shirt is formed of a cotton or cotton and elastic material and also stretches and moves when a hand is placed there under. In fact a t-shirt, with or without elastic yarns therein, would stretch more than the Fingelson garment that is made of just a woven material. The form-fitting function would depend greatly on the size of the wearer and not just on the type of material used to construct the garment. The garment would fit a larger busted person closer or tighter or more snugly than a smaller busted person and would therefore be

“form-fitting” as broadly claimed. Fingelson is therefore just as formfitting as what has been claimed and also covers “Armpit areas” as broadly claimed since the side portions of the Fingelson et al garment, along the side edges would cover the outer edges of one’s armpits at the front and rear shoulder areas. The fabric about one’s arm would fold over in use under the underarm and therefore be in an “armpit area”. The exact underarm area, such as in an isolated portion or specific underarm area, has not been claimed. Appellant’s drawings also show the armpit areas as extending outwardly from under the arms to cover a wearer’s lymph gland areas.

The Examiner disagrees with Appellant that the FIngelson et al garment is not broadly considered to be a shirt. The Fingelson et al garment is a shirt as broadly claimed in that it is a sleeveless shirt structure. Appellant has also not defined a specific coefficient of friction of the material and utilizes the same common garment materials that would be used in Fingelson et al. A specific stretch spandex construction must be claimed to overcome the Fingelson reference. However, such garments are widely known in the marketplace and are worn for comfort to a wearer. Appellant is arguing more than what has been specifically claimed. If Appellant’s garment is a knit or spandex structure it must be claimed as such. Also Appellant has not adequately claimed the “Armpit areas” as argued. The armpit areas have not been claimed as including fabric. . The Fingelson et al garment is a shirt as broadly claimed such as a tank t-shirt that includes a neck opening, front and back panels and arm openings necessary to form a shirt. The material of Fingelson et al is of a fabric or paper as broadly claimed which are thin materials. No specific “thinness” or “thickness” have

been claimed. Applicant is again arguing more than what has been claimed. Reference number 42 is an alignment point and appellant has not discussed the point 42 on page 3 of the remarks. Enlarging the Fingelson et al garment for larger breasts would have been an obvious modification to one having ordinary skill in the art which would include supplying a fabric/garment portion along the sides of the breast since large breasted women have more area along the sides of their bodies. Placing the pattern to cover all areas of the breast would also be an obvious modification. Morrison includes fabric over underarm or armpit areas and placing a pattern thereon would have been an obvious modification when placing patterns in body areas where one would want to do a breast exam. The placement of the Fingelson et al examination pattern on any upper torso body garment that would be worn by a wearer would be an obvious modification. The specific differences of applicant's invention have not been claimed. The specific garment structure to better describe the shirt structure with the torso encircling portion and sleeves formed of the spandex material needs to be claimed in order to be given patentable weight.

In response to appellant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made and not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F. 2nd 1392, 170 USPQ 209(CCPA 1971).

The addition of the printed matter for examination of the breasts as disclosed by Fingelson et al on other garments such as t-shirts, without or with spandex material therein, would have been an obvious modification. A combination of design choice as to what type of garment they would want the examination pattern on ,in addition to common sense, wherein one ordinary skill in the art would have the common sense and ability to place it on a garment that would cover all of the body areas where the examination pattern needs to lie. This would include such areas as in the underarm areas where lymph glands lie and also to cover larger breasted women. One of ordinary skill in the art would also have the ability and knowledge to construct the garment with a stretch knit spandex material so that the garment is comfortable on the wearer. Examining under or over the fabric surface is a matter of choice based on one's desire to be or not be touched closely in an examination wherein any lump that is to be felt would be felt with a common garment fabric normally used in shirts. Wherein the garment would not be in lieu of one's recommended breast scan/mammogram and would not be a final determination of whether one has a lump or not. The Fingelson et al shirt is just another examination pattern instruction guide similar to those found on charts to be hung on door knobs. Additionally, the term "Form-fitting" as broadly claimed is any garment that would fit on a wearer's body form and does not have to include that the garment is skin-tight fitting. Therefore, the line of patentability remains as stated above.

In regard to the term "formfitting" it is the Examiner's position that the term means that the garment fits snugly about the contours of the wearer's body. Such formfitting would

depend on the size and structural shape of the wearer. As previously stated, a wearer with a larger sized bust would allow the garment to be worn more snugly or formfittingly than a smaller busted woman. Appellant argues that Fingelson et al is not form-fitting since it allows a hand of a wearer to be placed under the outer surface layer. However, even what appellant considers to be formfitting, a spandex garment, would also allow a wearer's hand to be placed interiorly of the outer layer. If Fingelson et al was not at least somewhat formfitting the garment would fit too loosely on the wearer and would allow any other person in the vicinity to also see the wearer under the garment.

Appellant also suggests on page 7 state that Fingelson et al fails to teach armpit areas. It is still the Examiner's position that the metes and bounds of the "armpit area" has not been clearly defined and claimed. Only a general area has been claimed and the side portions of Fingelson et al at the arms are considered to be an armpit area as broadly claimed. A specific sleeve and underarm location must be defined and claimed.

Appellant's independent claim 1 does not claim a shirt as argued, but rather only a general garment. Appellant then claims a shirt in claim 2. A shirt includes a front, a back and neck and arm openings. The garment of Fingelson et al broadly includes those portions. The material that forms Fingelson et al is of a general garment material, paper or plastic all of which have a coefficient of friction to allow for movement along the surface. Appellant argues that Fingelson et al does not allow for the examination of the breast from outside of the garment. However, it is still the Examiner's position that Fingelson et al does allow for examination of the wearer along an outside of the garment. Applicant has not claimed the examination as being along an outside surface

of the front panel. Appellant is arguing more than what has been claimed. Appellant has not claimed gliding a finger over and in contact with the outside surface of the shirt material as argued. Even paper and plastic materials can be formfitting as discussed above and are also dependent upon the size of the wearer. Any garment material including the paper and plastic would allow for one to run their hand or finger across the material to examine their body surface over the material surface.

Response to Arguments in Regard to Ground 2, Rejection of Claims 7,11-14 and 16

The Examiner has not admitted that Fingelson et al fails to teach a garment comprising “armpit areas” as stated at the bottom of page 7 and top of page 9 of the Appeal Brief. On page 4, line 3 of the Final Office Action the Examiner only stated that the garment does not comprise areas directly over or under the underarm area. Appellant has not claimed a specific and exact area directly under the armpit of the wearer. In regard to claim 7 the Examiner did not admit that the Fingelson et al reference fails to teach armpit areas. The armpit areas are broadly adjacent to the upper arm areas over the side and adjacent to the armpit areas. Only broad “areas” have been claimed with a metes and bounds already defined.

Morrison discloses fabric areas that lie under a wearer’s arms. Exact armpit areas have not been claimed. In regard to the comments on page 8 of the Appeal Brief in regard to claim 28 it is the Examiner’s position that the area of the garment that is underneath the inside of the Fingelson et al garment is also “outside” of the garment material surfaces and is therefore also outside.

The areas over the side are under the arms adjacent to the armpit of the wearer. Only "broad areas" have been claimed with a metes and bounds defined. One checking for breast cancer knows to locate lymph node areas under the arms of the wearer. The Examiner only relied upon experience and the common knowledge and common sense used in breast examination which leads to the breast examination process that includes the lymph nodes under the arm. It is also the Examiner's position that the wearer's hand can be introduced from other angles such as up from the bottom. Also, the Morrison tube top side can be accessed up from the bottom end. The tube top sides do not extend far down the sides and would still provide support to the wearer. The Examiner's interpretation is a broad interpretation and appellant has not claimed gliding the finger across the garment front outside surface as argued. The Fingelson et al garment discloses the outside as being outside of the garment material surface. The Examiner has never stated that an inside area does not exist. The Examiner stated that the examination is "outside" of the interior material surface and is therefore, broadly interpreted again as the "outside" which was not claimed as "directly in the outside surface of the garment material" as intended and argued by appellant.

In regard to the arguments on page 10 in concerning claims 11-14 and 16 the same arguments in regard to claim 7 above stand.

In regard to the arguments concerning claims 12 and 13 it is still the Examiner's position that both Fingelson et al and Morrison disclose shirt wherein both are of a garment fabric that allows the movement as claimed. A specific coefficient of friction has not been claimed. Also, only broadly armpit areas have been claimed and not a specific

portion under a wearer's arm. The areas about the arm on both the Fingelson and Morrison references are armpit areas as broadly claimed wherein the armpit areas are along the side areas of the garments.

Response to Arguments in Regard to Ground 3, rejection of Claims 9,10,19-23,25-27 and 29

In regard to claims 9, 10 and 29 it is the Examiner's position that Rusin teaches a planar film and a marker device. Rusin was only relied upon for the marker element. The form fitting garment as previously discussed above is taught by Fingelson et al and Morrison. In regard to claim 19, Fingelson et al broadly teaches the t-shirt structure as discussed above. Morrison is relied upon for teaching the armpit areas as being a more defined underarm area as claimed. It is the Examiner's position that the Fingelson et al shirt is shaped in a "T" with a neck opening, torso portion and two arm openings. It is a sleeveless shirt. Even the outside surface of the Morrison garment would also provide a finger to slide there across as desired. The low coefficient of friction amount has not been exactly claimed. Only a broad friction element has been claimed. The term "low coefficient of friction" is a relative term and it has not been defined in regards to what the coefficient is low in regard to. In regard to claims 20 and 21, Fingelson et al discloses the garment with the coefficient of friction as broadly claimed especially since no specific coefficient of friction has been claimed. Fingelson et al discloses the general garment that fits a wearer's form and that includes armpit areas as desired and that includes the general use steps as claimed and as discussed on page 12 of Applicant's response.

Response to the Arguments in Regard to Ground 4, the rejection of Claims 17 and 18

AS previously discussed above, it is still the Examiner's position that Flngelson et al., Morrison, and Rusin all teach the form-fitting garment having armpit areas with armpit patterns thereon. The armpit area is broadly defined as the area adjacent to the armpits in the Flngelson et al garment which folds under a wearer's arms when worn as discussed above. The patterns extend to the edges of the Flngelson et al garment in the armpit areas as broadly claimed and additionally one of ordinary skill in the art with experience of breast examination and the well known charts used in such examination by the public and health care workers would know to extend the examination to the underarm lymph gland areas. Especially since the Morrison garment extends into those areas and allows for the gliding of the hands and fingers over those areas.

Therefore adding a detailed pattern in the underarm areas would have been an obvious modification to one having ordinary skill in the art in addition to common knowledge and sense in order to cover all areas where it is known that breast cancer will be present, such as in the lymph glands. The Rusin reference is only relied upon for the marking implement that is used to mark areas on the garment material. Flngelson et al , Morrison and Rusin do not teach away from each other but rather add upon each other wherein the garment of Flngelson et al shows areas of importance, the Morrison garment ads the smooth material surfaces to extend all about the wearer in the

underarm area where it is known that breast cancer tumors are located and Rusin discloses the marking of such areas onto a material used to find such tumors and mark them. One of ordinary skill in the art at the time the invention was made would have had the common sense and skill to provide a smooth garment with a pattern thereon and a means for marking the pattern when such tumors and lumps are found.

In conclusion, Fingelson et al, Morrison and Rusin disclose a general formfitting garment as claimed and as discussed above in addition to the marking of the garment surface to point out tumors on a wearer as desired.

Therefore, the final rejection of 12-28-07 still stands.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/Gloria Hale/

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/Gary L. Welch/

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